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Yoong Sze Fatt v Pengkalen Securities Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–398 OF 2006
LOW HOP BING, HELILIAH AND ABDUL MALIK ISHAK JJCA
11 FEBRUARY 2009

Civil Procedure — Estoppel — By conduct — Appellant incurred contra losses on share trading account — Appellant denied instructing any party to trade on account — No complaint, protest or query raised by appellant on receipt of contract notes, contra statements and letter of demand from respondent — Appellant submitted no case to answer at trial and elected not to call evidence — Whether appellant estopped from denying liability

This was an appeal against the decision of the High Court allowing the respondent's claim against the appellant for RM2.9m with interest and the dismissal of his counterclaim for RM2m with costs. The respondent was a stock broking company and member of Bursa Malaysia. The appellant, through his employer, the second defendant in the High Court proceedings, opened a trading account with the respondent and deposited RM2m therein for the purpose of trading in shares and securities (collectively termed 'shares'). The share trading pursuant to the account was governed by terms and conditions of an agreement by which the appellant, inter alia, (i) undertook to make immediate payment for delivery of shares purchased on his behalf (cl 6) (ii) undertook to indemnify the respondent against all losses incurred from the trading of shares by the respondent, and (iii) agreed to pay all charges and interest imposed by the respondent at its discretion. The respondent purchased certain shares for the appellant under the account on instructions given by the appellant's employer on the appellant's behalf to the respondent's remisier. The trading on the account resulted in losses. The appellant did not protest or query the respondent when he received the contract notes and contra statements regarding the trading on the account, neither did he complain that he had never allowed his employer to utilise the account nor assert that he himself did not authorise the transactions. He also did not respond to the respondent's letter of demand. At the close of the respondent's case in the High Court the appellant submitted that he had no case to answer and elected not to adduce any evidence.

Held, dismissing the appeal with costs:

(1) (per **Low Hop Bing JCA**) It is trite law that once a defendant in civil proceedings makes a submission of no case to answer and elects not to call evidence, then all the evidence led by the plaintiff must be presumed to be correct (see para 5).

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(2) (per **Low Hop Bing JCA**) While there was no evidence the appellant personally instructed the respondent's remisier to trade in the shares there was undisputed evidence the appellant's employer had on behalf of the appellant instructed the remisier to buy the shares pursuant to the account. This attracted the application of cl 6 of the agreement. The agreement was legally binding on the parties (see paras 18–19).

(3) (per **Low Hop Bing JCA**) If the appellant had nothing to do with the trading of the shares by his employer through the account a reasonable man in his position would have at the earliest opportunity raised a complaint, protest or query with the respondent concerning the contract notes, contra statements and letter of demand which were sent to his home address. He did not do so and it was too late in the day to deny liability. The appellant's conduct called for the application of the doctrine of estoppel (see para 21).

(4) (per **Abdul Malik Ishak JCA**) The contract notes and contra statements which were produced before the High Court were not challenged or disputed by the appellant. It would therefore be appropriate to hold that the appellant had in fact accepted the losses incurred on the trading account in its entirety (see para 15).

(5) (per **Abdul Malik Ishak JCA**) When a submission of no case to answer is made coupled with the election not to call witnesses, all evidence led by the plaintiff must be presumed to be correct and the burden falls on the defendant to call evidence to rebut the plaintiff's case. Failure to do so in the absence of reasonable explanation will trigger an adverse inference against the defendant under s 114 (g) of the Evidence Act 1950 (see para 21).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan responden terhadap perayu bagi RM2.9 juta dan penolakan tuntutan balasnya bagi RM2 juta dengan kos. Responden merupakan syarikat broker saham dan ahli Bursa Malaysia. Perayu, melalui majikannya, defendan kedua dalam prosiding Mahkamah Tinggi, membuka akaun perniagaan dengan responden dan mendepositkan RM2 juta dengannya bagi tujuan perniagaan dalam syer-syer dan sekuriti (secara kolektif disebut 'syer-syer'). Syer-syer perniagaan berikutan daripada akaun tertakluk kepada terma dan syarat perjanjian yang mana perayu, antara lain (i) mengakujanji untuk membuat pembayaran serta-merta bagi penghantaran syer yang dibeli bagi pihaknya ('klausa 6'); (ii) mengakujanji untuk menanggung semua kerugian responden yang berlaku daripada perniagaan syer-syer oleh responden, dan (iii) bersetuju untuk membayar semua caj dan faedah yang dikenakan oleh responden ke atasnya. Responden membeli syer-syer tertentu untuk perayu di bawah akaun atas arahan yang diberikan majikan perayu dan bagi pihak perayu kepada

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A remisier perayu. Perniagaan akaun tersebut menyebabkan kerugian. Perayu tidak memprotes atau mempersoalkan responden apabila dia menerima nota-nota kontrak dan penyata-penyata kontra berkenaan perniagaan ke atas akaun dan dia tidak mengadu bahawa dia tidak membenarkan majikannya untuk menggunakan serta dia juga tidak menyatakan bahawa dia sendiri tidak B memberi kuasa kepada transaksi-transaksi tersebut. Dia juga tidak memberi jawapan kepada surat tuntutan responden. Di akhir kes responden di Mahkamah Tinggi, perayu menghujahkan dia tiada kes untuk dijawab dan memilih untuk tidak mengemukakan apa-apa bukti.

C **Diputuskan**, menolak rayuan dengan kos:

(1) (oleh **Low Hop Bing HMR**) Adalah undang-undang nyata bahawa apabila defendan dalam prosiding sivil membuat penghujahan tiada kes untuk dijawab dan memilih untuk tidak mengemukakan bukti, dengan D itu kesemua bukti yang dibawa oleh plaintif hendaklah dianggap sebagai benar (lihat perenggan 5).

(2) (oleh **Low Hop Bing HMR**) Memandangkan tiada bukti bahawa perayu secara peribadinya memberi arahan kepada remisier responden untuk memperniagakan syer-syer, tiada bukti yang tidak boleh dipertikaikan E bahawa majikan perayu telah, bagi pihak perayu, mengarahkan remisier untuk membeli syer-syer berikutan dengan akaun. Ini menarik kepada permohonan klausa 6 di bawah perjanjian. Perjanjian adalah mengikat pihak-pihak (lihat perenggan 18–19).

F (3) (oleh **Low Hop Bing HMR**) Jika perayu tiada kaitan dengan perniagaan syer-syer oleh majikannya melalui akaun, seorang yang munasabah dalam jawatannya akan pada peluang yang paling awal membangkitkan aduan, protes atau mempersoalkan responden mengenai nota-nota kontrak, penyata-penyata kontra dan surat tuntut yang dihantar ke G alamat rumahnya. Dia tidak berbuat sedemikian dan kini sudah terlambat untuk menolak tanggungan. Perlakuan perayu memerlukan permohonan doktrin estopel (lihat perenggan 21).

(4) (oleh **Abdul Malik Ishak HMR**) Nota-nota kontrak dan H penyata-penyata kontra yang dikemukakan di Mahkamah Tinggi tidak dicabar atau dipertikaikan oleh perayu. Dengan itu, adalah wajar untuk memutuskan bahawa perayu telah menerima kerugian yang berlaku dalam akaun perniagaan secara keseluruhannya (lihat perenggan 15).

(5) (oleh **Abdul Malik Ishak HMR**) Apabila penghujahan tiada kes untuk I dijawab dibuat bersama dengan pilihan untuk tidak memanggil saksi-saksi, semua bukti yang dikemukakan oleh plaintif mestilah dianggap sebagai benar dan beban jatuh ke atas defendan untuk mengemukakan keterangan bagi menyangkal kes plaintif. Kegagalan berbuat sedemikian dengan ketiadaan penjelasan yang munasabah akan

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menyebabkan inferens menjejaskan terhadap defendan di bawah s 114(g) Akta Keterangan 1950 (lihat perenggan 21).]

Notes:

For cases on estoppel by conduct, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2858–2864.

Cases referred to

Alexander v Rayson [1936] 1 KN 169 (refd)
Associated Tractors Sdn Bhd v Woo Sai Wa [1997] 5 MLJ 441, HC (refd)
Benham Limited v Kythirra Investments Ltd (2003) EWCA Civ 1794, CA (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)
Boyce v Wyatt Engineering [2011] EWCA Civ 692 (refd)
Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd [1995] 2 MLJ 153; [1995] 2 AMR 1353, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 6 AMR 781; [2004] 4 CLJ 309, FC (refd)
Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, SC (refd)
Lai Yong Koon v PP [1962] MLJ 327 (refd)
Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd and other appeals [2004] 4 MLJ 105; [2004] 6 AMR 319; [2004] 4 CLJ 282, CA (refd)
Miller (t/a Waterloo Plant) v Cawley [2002] EWCA Civ 1100 (refd)
Oakland Metal Co, Ltd v D Benaim & Co, Ltd (1953) 2 QB 261; [1953] 2 All ER 650 (refd)
PP v Yiau Swee Tung [1999] 3 MLJ 353, HC (refd)
RHB-Cathay Securities Ptd Ltd v Ibrahim Khan and other actions [1999] 3 SLR 464, HC (refd)
Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131; [2006] 3 AMR 410; [2006] 2 CLJ 337, CA (refd)
Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor [2006] 6 MLJ 229, CA. (refd)
Toronto Railway Company v Corporation of the City of Toronto [1904] AC 809 (refd)
Wisniewski v Central Manchester Health Authority [1998] Lloyd's Rep Med 223, CA (refd)
Alfred Ernest Derrick (1910) 5 Cr App R 162 (refd)
Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567; [2003] 2 AMR 6; [2003] 1 CLJ 585, CA (refd)
Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301, FC; [2007] 2 CLJ 1, FC (refd)
Burgoyne & Co, Ld and PB Burgoyne v A H Godfrey & Co (1904) 22 RPC 168, CA (refd)

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A *Chai Then Song v Malayan United Finance Bhd* [1993] 2 CLJ 641, HC
Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61, FC (refd)
Dunn v Shanks [1932] NI 66, CA (refd)
B *EON Bank Bhd v Hotel Flamingo and another case* [2005] 1 MLJ 712, HC (refd)
Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)
Else v Barnard [1860] 28 Beav 228 (refd)
C *Fortunatus Edmund Andrews v John Elliott* [1855] 5 Ellis and Blackburn 502 (refd)
Gwyther v Boslymon Quarries, Limited [1950] 2 KB 59; [1950] 1 All ER 384 (refd)
D *Herman v Royal Exchange Shipping Co and Patton, Jr & Co* (1884) Cab & El 413 (refd)
Hopgood v Brown [1955] 1 All ER 550; [1955] 1 WLR 213, CA (refd)
Jackson v Knutsford Urban District Council [1914] 2 Ch 686 (refd)
Len Min Kong v United Malayan Banking Corp Bhd and another appeal [1998]
E 2 MLJ 478; [1998] 3 AMR 2641; [1998] 2 CLJ 879, CA (refd)
Lim Chor Ching & Anor v Idris Abdul Karim (and Anor Appeal) [1998] 3 AMR 3182; [1998] 3 CLJ Supp 145, HC (refd)
Loo Hon Kong v Loo Kim Lim @ Loo Kim Leong [2004] 4 AMR 591; [2004] 4 CLJ 1, CA (refd)
F *Murarilal v State of MP* AIR 1980 SC 531 (refd)
Peyman v Lanjani and others [1985] Ch 457; [1984] 3 All ER 703, CA (refd)
Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh [1997] 3 AMR 2430; [1997] 2 MLJ 373, CA (refd)
G *Sarawak Securities Sdn Bhd v Andy Chan Chiaw Guan; Fabian Eh Ng (third party)* [2000] 7 CLJ 364, HC (refd)
Shrager v Basil Dighton, Limited, And Others [1924] 1 KB 274, CA (refd)
Sim Ah Song & Anor v Rex [1951] MLJ 150 (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
H *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701, CA (refd)
Queen, The v Silverlock [1894] 2 QB 766 (refd)
Thomas Tyerman v Sarah Smith [1856] 6 Ellis and Blackburn 719 (refd)
Thomas v Brown (1875–76) 1 QBD 714 (refd)
I *Wasakah Singh v Bachan Singh* (1931) 1 MC 125 (refd)
Whitehouse v Jordan And Another [1981] 1 WLR 246, HL (refd)
Wright v John Bagnall & Sons, Limited [1900] 2 QB 240, CA (refd)
Yorkshire Insurance Company, Limited And Others v Craine [1922] 2 AC 541, PC (refd)

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Legislation referred to

Evidence Act 1950 ss 51, 60(1)(d), 73, 101, 102, 103, 114(g),

Appeal from: Suit No D2–22–1159 of 1999 (High Court, Kuala Lumpur)

Tharmaiden Singh (Wong Guo Lun with him) (Vazeer Akhbar Majid & Co) for the appellant.

Sulaiman Abdullah (Stanley S Sinnappen with him) (Izral Partnership) for the respondent.

Low Hop Bing JCA:

APPEAL

[1] This appeal by the appellant ('the defendant') is directed against the decision of the learned High Court judge who had allowed the respondent's ('the plaintiff's') claim for the sum of RM2,927,621.70 with interest against the defendant, and dismissed the defendant's counterclaim for RM2m, with costs (collectively 'the entire judgment').

[2] On 23 January 2009, we dismissed the appeal and affirmed the entire judgment of the court below. Our grounds now follow.

SUBMISSION OF NO CASE TO ANSWER

[3] The first issue, raised by the plaintiff's learned counsel Mr Tharmaiden Singh (Mr Wong Guo Lun with him), is a question of law. It concerns the legal implications of the defendant's submission of no case to answer, coupled with the intention not to call witnesses. It was submitted that, in the circumstances, all evidence adduced in the plaintiff's case must be presumed to be correct, on the basis of *Wasakah Singh v Bachan Singh* (1931) 1 MC 125; *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 (SC) and *Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor* [2006] 6 MLJ 229 (CA).

[4] The defendant's learned counsel, Hj Sulaiman bin Abdullah (assisted by Mr Stanley S Sinnappen) offered no response to the above submission.

[5] In our judgment, it is trite law that once a defendant in civil proceedings makes a submission of no case to answer and elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be correct: per Gopal Sri Ram, JCA in *Jaafar bin Shaari* at p 712, citing *Wasakah Singh*. This principle has found similar expression in a number of judgments handed down in the motherland of common law. These cases include *Alexander v Rayson* [1936] 1

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KN 169; *Boyce v Wyatt Engineering* [2001] EWCA Civ 692; *Miller (t/a Waterloo Plant) v Cawley* [2002] EWCA Civ 1100 and *Benham Limited v Kythirra Investments Ltd* [2003] EWCA Civ 1794.

[6] With this principle uppermost in our mind, we proceeded to consider the evidence led by the plaintiff in the court below, which culminated in the finding of facts.

FINDING OF FACTS

[7] After a full trial, the court below arrived at a finding of facts which may be unfolded below.

[8] The plaintiff is a stock broking company and a member of the Kuala Lumpur Stock Exchange (KLSE), now Bursa Malaysia. The defendant was the plaintiff's client who had through his employer one Dato' Wong Yeon Chai opened trading account No 273077 with the plaintiff ('the account') in which the defendant had placed a sum of RM2m for the purpose of trading in shares and securities (collectively 'the shares').

[9] The defendant's employer is not an appellant herein. The trading of the shares pursuant to the account is subject to the terms and conditions contained in the agreement which was brought into existence ('the agreement') vide the defendant's application for the account. It is also subject to the rules and regulations of the KLSE.

[10] The material terms and conditions thereof, inter alia, are to the following effect:

(a) The defendant undertakes to make immediate payment for delivery of the shares purchased on his behalf (cl 6);

(b) The defendant authorises the plaintiff to sell or buy shares and undertakes to indemnify the plaintiff against all losses in such events (cl 9);

(c) The defendant agrees to pay all charges and interest rates imposed by the plaintiff at the plaintiff's discretion (cl 11);

(d) The defendant authorises the plaintiff to debit the account for the purchase of shares (cl 15); and

(e) All orders made through the phone shall not be revoked or withdrawn and shall be confirmed by the defendant

[11] It is the plaintiff's practice to record the client's instructions to purchase

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shares on a manual 'business done' slip which is then passed on to the plaintiff's back room staff who would then key into the system the confirmation of the instructions.

[12] The plaintiff had, on 19 November 1997, purchased 602,000 shares for the defendant under the account pursuant to the instructions given by the defendant's employer on the defendant's behalf to the plaintiff's remisier (PW2).

[13] When the defendant received the contract notes and contra statements sent by the plaintiff to the defendant's home address provided by the defendant in his application for the opening of the account, in relation to the aforesaid purchase of shares, the defendant had not raised any protest or query with the plaintiff. He had not complained to the plaintiff that he had never allowed his employer to utilise the account.

[14] At all material time prior to the plaintiff's commencement of the action against him in the High Court, the defendant had chosen to remain silent in relation to the contract notes and contra statements which were sent to him. He had never asserted that the purchase was not his transaction, nor had he responded to the plaintiff's letter of demand dated 28 November 1997 which was also sent to him at his home address.

[15] At the close of plaintiff's case, the defendant submitted that the he had no case to answer, and elected not to adduce any evidence.

SHARE PURCHASE

[16] The defendant's contention is that the defendant had never instructed the plaintiff, the plaintiff's remisier or any third party to purchase the shares pursuant to the defendant's account, and so the plaintiff has failed to prove its claim against the defendant and that the defendant has in turn established the counterclaim against the plaintiff.

[17] The plaintiff argued that the defendants' pleaded position was one of unsubstantiated denial.

[18] In our judgment, the terms and conditions, contained in the agreement which the defendant and the plaintiff had brought into existence consequent upon the defendant's application to the plaintiff to open the account with the deposit of RM2m to enable him to trade in shares listed on the KLSE, are

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legally binding on the parties viz the defendant and the plaintiff herein: *Sarawak Securities Sdn Bhd v Andy Chan Chiaw Guan; Fabian Eh Ng (third party)* [2000] 7 CLJ 364 (HC).

[19] While it is true that there was no evidence of the defendant personally instructing the plaintiff's remisier to trade in the shares, there was indeed undisputed evidence that the defendant's employer had on behalf of the defendant instructed the plaintiff's remisier (PW2) to purchase the shares pursuant to the account. The purchase of the shares had been transacted by the defendant's employer on behalf of the defendant. This would attract the application of cl 6 of the agreement.

[20] After having received the contract notes and contra statements from the plaintiff, the defendant had never protested nor queried the plaintiff thereon. There was also no complaint by the defendant that he had not allowed his employer to utilise the account. He was completely oblivious to the plaintiff's letter of demand. The defendant's conduct or absence of response speaks volumes against the defendant. The silence, indeed the omission, by the defendant in this regard is deafening.

[21] In our judgment, if the defendant had really nothing to do with the account or the trading of the shares by his employer through the account, which is flushed with an enormous amount of RM2m, the defendant as a reasonable man would no doubt have at the earliest opportunity raised a complaint, protest or query with the plaintiff in relation to the contract notes, contra statements and letter of demand sent to his home address. He had not done so. It is now too late in the day to deny liability after the commencement of the suit, a fortiori, in this appeal. The defendant's conduct certainly calls for the application of the doctrine of estoppel.

[22] In *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 (CA), the wife who had helped her husband to trade in shares vide the husband's contract with Seremban Securities Sdn Bhd, despite the mareva injunction against the husband, by signing all the cheques in her cheque book, had her defence and counterclaim struck out. The Court of Appeal through the judgment of Gopal Sri Ram, held, inter alia, that the wife by her actings, would have led a reasonable man to believe that she had given her husband a carte blanche to act on her behalf. His Lordship applied the doctrine of estoppel which is a flexible doctrine by which courts seek to do essential justice between litigating parties: see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 344 (FC)

[23] In *RHB-Cathay Securities Ptd Ltd v Ibrahim Khan and other actions* [1999] 3 SLR 464, the defendants maintained share trading accounts with the

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plaintiff's dealer. The defendant had traded in their accounts through the dealer and incurred substantial contra trading losses. The defendants claimed that the trades in the accounts were unauthorised and were transacted by the dealer without their knowledge. The defendants were sent, inter alia, numerous contract notes and contra statements. The defendants did not dispute any of these trades until proceedings were commenced against them. The plaintiff averred that the defendants had full knowledge of all the trades and were estopped from denying them. Chan Seng Onn JC of the Singapore High Court allowed the plaintiff's claim, on the grounds, inter alia, that the defendants' stunning silence after receiving the contract notes and contra statements would constitute an estoppel at law which precluded their denial of the trades.

CONCLUSION

[24] On the foregoing grounds, we are of the unanimous view that the learned trial judge had arrived at a correct finding of facts and had rightly applied the law. We therefore dismissed the defendant's appeal with costs. We affirmed the entire judgment of the court below. Deposit to the plaintiff-respondent on account of taxed costs.

[25] My learned sister, Heliliah bt Mohd Yusof JCA has read this judgment in draft and has expressed her concurrence with it. My learned brother Abdul Malik bin Hj Ishak JCA has also agreed with my judgment in draft and has further indicated that His Lordship would write a separate supporting judgment.

Abdul Malik Ishak JCA:

INTRODUCTION

[26] I have read the judgment in draft of my learned brother Low Hop Bing JCA and I would like to add my own reasons for dismissing this appeal with costs and thereby affirming the entire judgment of the High Court.

[27] For convenience, I shall refer the parties in the same manner as they were referred to in the High Court. Thus, the appellant by the name of Yoong Sze Fatt will be referred to as the first defendant. While the respondent by the name of Pengkalen Securities Sdn Bhd will be referred to as the plaintiff. The second defendant by the name of Dato' Wong Yeon Chai was not a party in this appeal.

TO THE HEART OF THE MATTER

[28] Essentially the plaintiff's claim was for the sum of RM2,927,621.70

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A calculated as at 28 February 1999 being contra losses and accrued interest that arose from share trading activities conducted by or on behalf of the first defendant by way of an individual account No 273077 ('trading account') that was opened by the second defendant in favour of the first defendant.

B **[29]** The plaintiff as a stock broking company and as a member of the Kuala Lumpur Stock Exchange carried on the business of stock broking. The first defendant was the client of the plaintiff and had a trading account with the plaintiff.

C **[30]** The first defendant had placed in his trading account a sum of RM2m so as to enable him to trade in shares and securities. It was this sum of RM2m that formed the counterclaim of the first defendant.

D **[31]** The plaintiff succeeded in establishing its entitlement to its claim by proving the following set of facts:

(a) that the trading account was opened by the first defendant upon the terms as set out in the individual account opening Form ('agreement');

E (b) that trades were conducted on the trading account of the first defendant which had resulted in losses; and

(c) that the first defendant stood liable for the losses incurred on his trading account by virtue of those terms as set out in the agreement as well as his

F knowledge and consent pertaining to the trades conducted on his trading account.

[32] The terms and conditions relating to the trading account were binding

G on the first defendant because he agreed to be bound by it (*Chai Then Song v Malayan United Finance Bhd* [1993] 2 CLJ 641; and *Sarawak Securities Sdn Bhd v Andy Chan Chiaw Guan; Fabian Eh Ng (third party)* [2000] 7 CLJ 364). Inter alia, the material terms and conditions that have been agreed to by the first defendant upon signing the agreement may be stated as follows (see p 256 of the appeal record):

H

(a) by cl 6 of the agreement, the first defendant undertook to make immediate payment for delivery of securities purchased on his behalf;.

(b) by cl 9 of the agreement, the first defendant authorised the plaintiff to

I sell-out or buy-in securities as may be required to clear the first defendant's position and, once again, the first defendant undertook to indemnify the plaintiff against all losses; and

(c) by cl 11 of the agreement, the first defendant agreed to pay all charges and interest rates imposed by the plaintiff at the plaintiff's discretion

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[33] Evidence was led to show that transactions were conducted on the trading account which led to an overall loss on the said account. This fact was established through the evidence of Chua Yew Leong (PW1) and the contract notes that were tendered showed that trades were indeed conducted. It must be borne in mind that this piece of evidence went unchallenged because there was no cross-examination of Chua Yew Leong (PW1) and, consequently, it must be taken to be admitted by the first defendant (*Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 at p 400).

[34] Authorised by the first defendant to trade on his (the first defendant's) behalf. The first defendant's answer to the plaintiff's claim was rather simple. That he was not the one who instructed those trades that resulted in the losses and that the second defendant, who was not a party in this appeal, was said not to have been authorised by the first defendant to trade on his (the first defendant's) behalf.

[35] Unfortunately, the first defendant elected not to testify and neither has he led any evidence to support his wild assertions.

[36] There was evidence emanating from Leong Bik Ngan (PW2) to show that the first defendant knew or ought to have known that his trading account was being traded upon. That evidence would be as follows:

(a) the contract notes and the contra statements were sent to the first defendant's home address;

(b) the first defendant remained silent and did not complain to the plaintiff that his trading account was being utilised for trades or that the contract notes which were sent to him were not his transaction; and

(c) the letter of demand dated 28 November 1997 was sent to the first defendant at his home address, yet the first defendant did not contact the plaintiff to dispute the plaintiff's letter of demand.

[37] Having failed to protest to the transactions or usage of his trading account, the first defendant must now be estopped from denying the losses arising from the trades conducted on his trading account. According to the case of *Peyman v Lanjani and others* [1985] Ch 457; [1984] 3 All ER 703, (CA), a party will not be held to be estopped unless his conduct is unequivocal. Thus, in *Herman v Royal Exchange Shipping Co and Patton, Jr & Co* (1884) Cab & El 413, the court held that after accepting freight on goods shipped under bills of lading in their printed forms, certain persons were estopped from saying that the ship was not theirs, that the master was not their agent and that the contract was not with them. In *Gwyther v Boslymon Quarries, Limited* [1950] 2 KB 59; [1950] 1 All ER 384, a person entitled to payments from which the payer had wrongfully deducted tax, without objection from the payee was estopped from

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demanding payment of the amount of tax wrongfully deducted for which the payer had accounted to the Inland Revenue. In *Thomas v Brown* (1875–76) 1 QBD 714 at p 722, a party was estopped by conduct when investigating title from denying the existence of the contract. In *Else v Barnard* [1860] 28 Beav 228 a purchaser was estopped from objecting that the sale was not by auction. In *Wright v John Bagnall & Sons, Limited* (1900) 2 QB 240 (CA), an employer who admitted statutory liability to pay compensation was estopped from raising the defence that the claim was not brought within the prescribed time. In *Burgoyne & Co, Ld and PB Burgoyne v A H Godfrey & Co* (1904) 22 RPC 168 (CA), the conduct of a shipper in selling wine branded with his name prevented him from complaining of the act of a purchaser in selling it as the shipper's wine. In *Jackson v Knutsford Urban District Council* [1914] 2 Ch 686 at p 696, after having entered into a bargain by which they agreed not to object to part of a building being treated as an obstruction, the plaintiffs were estopped from alleging that no part of the building was an obstructive building. In *Yorkshire Insurance Company, Limited And Others v Craine* [1922] 2 AC 541 (PC), insurers, taking possession under a salvage clause in a fire insurance policy, were estopped from relying on non-fulfilment of the requirements of an independent condition as to delivery of particulars of the claim. In *Dunn v Shanks* [1932] NI 66 (CA), the former owner of a business who had omitted to give notice of the transfer of the business and continued to attend to it was estopped from denying that he was the owner. In *Hopgood v Brown* [1955] 1 All ER 550 at p 559; [1955] 1 WLR 213 at p 223, (CA), the successor in title of a landowner who permitted an adjoining owner to encroach over a boundary with a permanent erection was estopped from claiming damages in respect of such encroachment.

[38] The law journals are replete with authorities on estoppel by conduct. It must be emphasised that parties to litigation who have continued the proceedings with knowledge of an irregularity of which they might have availed themselves are definitely estopped from afterwards setting it up (*Oakland Metal Co, Ltd v Benaim & Co, Ltd* [1953] 2 QBD 261; [1953] 2 All ER 650; *Toronto Railway Company v Corporation of the city of Toronto* [1904] AC 809 at p 815, (PC); *Thomas Tyerman v Sarah Smith* [1856] 6 Ellis and Blackburn 719; *Fortunatus Edmund Andrews v John Elliott* [1855] 5 Ellis and Blackburn 502; affirmed in (1856) 6 E & B 338, Ex Ch *Shrager v Basil Dighton, Limited, And Others* [1924] 1 KB 274, (CA); and *Oakland Metal Co, Ltd v D Benaim & Co, Ltd* (1953) 2 QB 261; [1953] 2 All ER 650).

[39] Now, with the failure of the first defendant to testify or to lead any evidence, the probability of the case falls in favour of the plaintiff. The first defendant had either:

(a) instructed the trades; or

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(b) had given authority to the second defendant to trade on his behalf; or

(c) willingly consented to his trading account to be utilised by the second defendant; or

(d) did not monitor his trading account and merely disputed the contract notes and the contra statements that were sent to him.

[40] It must be borne in mind that the contract notes and the contra statements which were produced before the High Court were not challenged nor disputed by the first defendant. That being the case, it would be appropriate to hold that the first defendant had in fact accepted the losses incurred on the trading account in its entirety (*Sivalingam a/l Periasamy v Periasamy & Anor*).

[41] Having considered the arguments of counsel on both sides and the authorities cited by them, I am of the opinion that the following guidelines may be taken as well settled. At the close of the plaintiff's case, the first defendant chose to submit that there was no case to answer and preferred not to call witnesses. It was a perilous course to take simply because all the evidence adduced by the plaintiff must be presumed to be correct. It is a sound general rule that a judge should not consider a submission of no case to answer unless the defendant (here the first defendant) agrees not to call any evidence, whatever the outcome of the submission. Thus, where a defendant is put to his election and elects not to call evidence, just like the present appeal, the result is this. That the trial is in effect truncated and the question for the judge to consider is whether the plaintiff has established his case by the evidence called on the balance of probabilities. If the plaintiff has done so, then the judgment should be given to the plaintiff. If the plaintiff has not done so, then the judgment should be given to the defendant. If the judge chooses the latter course of action and give judgment to the defendant, the judge may indeed be of the view that there is no case for the defendant to answer. But such a judgment should not be given unless the judge finds that the plaintiff has not established his case by the evidence adduced on the balance of probabilities.

[42] I shall now refer to the case of *Benham Ltd v Kythira Investments Ltd* [2003] EWCA Civ 1794; [2004] CP Rep 17, (CA) (Civ Div). The facts may be stated as follows. A property company (D) retained estate agents (C). C summarily dismissed one of their senior employees (X) on the ground that he took a secret profit on a particular transaction involving D. C brought a claim against D for commission for that transaction. D denied C's principal allegations. C's claim was weakened by the facts that (i) no agency agreement in writing for the transaction existed, and (ii) for obvious reasons, C were unable to call X as a witness. At the close of C's evidence, D submitted that there was no case to answer. The judge ruled that (a) this was an exceptional case in which

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it was appropriate to rule on the submission without putting D to elect not to call evidence, and (b) the judge acceded to D's submission and (c) consequently, dismissed C's claim with costs.

[43] The Court of Appeal allowed C's claim. In answering the question of in what exceptional circumstances may or should a judge consider a submission of no case without putting the defendant to his election?, the Court of Appeal held (a) rarely, if ever, should a judge trying a civil action entertain a defendant's submission of no case to answer without requiring the defendant to elect not to call evidence, and (b) this was not an exceptional case because the judge was wrong to conclude that nothing in D's evidence would affect the view taken of C's case because the judge should have recognised that were their submissions were to fail, then D might (i) call evidence that would prove helpful to C's case, or (ii) fail to call witnesses who might be expected to have material evidence thereby enabling the court to draw inferences in C's favour *(Wisniewski v Central Manchester Health Authority* [1998] Lloyd's Rep Med 223, (CA)).

[44] In dealing with a submission of no case to answer, what test should the judge apply? The Court of Appeal in the *Benham*'s case said that the test was whether or not on the evidence adduced by the plaintiff, the plaintiff has 'a real prospect of success'. However, the Court of Appeal conceded that what is meant by that test is not as clear as it might be. Simon Brown LJ explained that where D's witnesses clearly have material evidence to give on the critical issue in the action the test of whether C has 'a real prospect of success' may be re-formulated as 'have the claimants (plaintiffs) advanced a prima facie case to answer, a scintilla of evidence in support of the inference for which they contend, sufficient to call for an explanation from the defendant?' His Lordship added that the fact that C's case may be a weak case and unlikely to succeed unless assisted, rather than contradicted, by D's evidence, or by adverse inferences to be drawn from D's not calling any evidence, would not allow it to be dismissed on a no case submission. The Court of Appeal concluded that it was apparent that the judge had approached the question by asking whether or not C had established their case on a balance of probabilities and in the circumstances had clearly applied the wrong test.

[45] Back home, on the subject of the submission of no case to answer we have the classic case of *Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor* [2006] 6 MLJ 229 (CA) which also made reference to the *Benham*'s case. My learned brother Low Hop Bing JCA also referred to *Subry bin Hamid* in his well written judgment.

[46] Suffice for me to say that when a submission of no case to answer has been made and coupled with the submission that no witnesses will be called, it

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gives rise to these unrebuttable implications:

(a) the outcome to the question of whether there is a case to answer would be that all evidence led by the plaintiff must be presumed to be correct; and

(b) so the burden falls on the first defendant to call evidence to rebut the plaintiff's case and the first defendant's failure to do so in the absence of reasonable explanation will trigger an adverse inference to be drawn against the first defendant under s 114(g) of the Evidence Act 1950.

[47] As against the plaintiff's pleaded case, the first defendant's pleaded case was generally one of unsubstantiated denials coupled with a counterclaim for the refund of the deposit monies to the tune of RM2m. Since the evidence led by the plaintiff must be presumed to be true, the plaintiff has therefore satisfied the requirements under s 101 of the Evidence Act 1950. It therefore falls on the first defendant to prove his defence under s 101 of the Evidence Act 1950. The first defendant too has to introduce such evidence as is necessary to discharge that burden under ss 102 and ss 103 of the Evidence Act 1950. As I said earlier, the first defendant chose a perilous course of action and his failure to call evidence would result in an appropriate adverse inference to be drawn against him. Thus, the allegations by the first defendant that there were other sets of account opening forms were nothing more than a mere fabrication. And it must be held that the first defendant had consented to or otherwise permitted the second defendant to utilise his trading account to trade in securities which ultimately result in contra losses which are now the subject matter of the plaintiff's claim. It must also be held that the relevant documents marked as exhs 'P1', 'P2' and 'P18' were indeed executed by the first defendant. And that the relevant contract notes, contra statements and statements of accounts were indeed sent by the plaintiff and received by the first defendant and no one else.

[48] It must be emphasised that the first defendant produced a purported handwriting expert's report and tendered peculiarly through the first defendant's trial counsel to prove the first defendant's contention that he did not sign the account opening form.

[49] Anuar CJ Malaya in *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61 at p 85 referred to the Supreme Court of India's decision in *Murarilal v State of MP* AIR 1980 SC 531 at p 534 which carried the following passages:

> But, the hazard in accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witnesses — the equality of credibility or incredibility being one which an expert shares with all other witnesses — but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion. The more developed and the more perfect a science, the less

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A the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of identification of finger-prints has attained near perfection and the risk of an incorrect opinion is practically non- existent. On the other hand, the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher.

B

[50] There is an article entitled 'Sources of Error in Forensic Handwriting Evaluation' reported in the Journal of Forensic Sciences, Vol 40, No 1, January 1995 at p 78 which carries the following germane write-ups:

C Handwriting examination is generally considered, by friends and critics alike, to be more subjective than the other crime laboratory specialties in that it relies more on experienced judgment than on quantifiable data. If we accept this premise, it would follow that it should be all the more important to adhere to agreed-on principles so as to preserve the greatest degree of objectivity and, thereby, accuracy.

D Three particular problem areas seem to cause most of the errors in handwriting cases, whether they involve signatures, handwritten texts, or handprinting. They are (1) failure to properly evaluate differences; (2) failure to detect significant movement characteristics; and (3) the use of self-serving exemplars.

E **[51]** In so far as handwriting is concerned, even lay witnesses who are familiar with the writing of the person in question may give evidence as to the identity of the writer (*Alfred Ernest Derrick* (1910) 5 Cr App R 162). Of course, evidence relating to handwriting by experts are most welcome although the form in which they give evidence will be different. According to the case of *The*
F *Queen v Silverlock* (1894) 2 QB 766, at p 771:

the witness who is called upon to give evidence founded on a comparison of handwritings must be peritus; he must be skilled in doing so; but we cannot say that he must have become peritus in the way of his business or in any definite way. The question is, is he peritus? Is he skilled? Has he an adequate knowledge?

G

[52] It is the duty of the court to satisfy itself that the 'expert' is indeed an expert specially qualified, armed with the necessary skill and experience and has a vast knowledge in the field of enquiry carried out by him. The court would
H also want to know the duration of time the 'expert' has engaged himself in his field of expertise and whether that is his only occupation and in which court he has testified. Generally, the court is interested to know the expert's background. The purpose is simply to show the competency of the expert. It is for these reasons that the expert will be asked about his general and technical education
I together with the special studies which he may have undertaken.

[53] Competency of the expert may be shown by drawing attention to the ways in which the expert has been recognised as an authority in his field. Thus, the expert may allude to the schools, associations and seminars where he has

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lectured and whether he has been bestowed with special honours or degrees by prominent universities. And publication of writings in recognised journals is also good evidence of the extent of the expert's competency. In short, the 'expert' must be a qualified person.

[54] Lord Wilberforce in *Whitehouse v Jordan And Another* [1981] 1 WLR 246 at pp 256 H– 257 A aptly said:

> While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.

[55] Section 51 of the Evidence Act 1950 states that whenever the opinion of any living person is relevant, the grounds on which his opinion is based are also relevant. The courts have said, time and again, that a bare expression of opinion has no evidentiary value at all (*Sim Ah Song & Anor v Rex* [1951] MLJ 150; *Lai Yong Koon v Public Prosecutor* [1962] MLJ 327; and *Public Prosecutor v Yiau Swee Tung* [1999] 3 MLJ 353). Brown, acting CJ in *Sim Ah Song & Anor v Rex* at p 151 aptly said:

> The business of an expert witness is to draw upon the store of his knowledge and experience in order to explain some matter which his experience should qualify him to understand. He is quite entitled to express his opinion, which indeed is the natural corollary of his explanation. But a bare expression of his opinion has no evidential value at all. Unless he gives an explanation which supplies the understanding of the subject which the court lacks, the court is in no better position than it was before to determine the question which it is its duty to determine, and if the court acts upon a bare expression of the expert's opinion the determination of the question becomes that of the expert and not of the court.

[56] So, the court must be vigilant and must satisfy itself that the 'expert' is indeed an expert specially qualified. Here, the 'expert' report tendered by the first defendant's trial counsel failed to comply with the simple preliminary requirements of establishing the 'expert's' qualifications and for this reason, it should be disregarded.

[57] To compound the matter further, the 'expert' had passed away prior to the trial of the matter and his death had affected the admissibility of the 'expert's' report sought to be relied upon by the first defendant.

[58] As an opinion evidence, the expert must come to court to give evidence. Section 60(1)(d) of the Evidence Act 1950 states that direct oral evidence must be given in respect of the opinion of any person. Thus, in the absence of such direct evidence from the 'expert' his report cannot in law be admissible as

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evidence. The lack of opportunity to cross-examine the 'expert' on his report is another ground to disregard the 'expert's' report.

[59] The sample or specimen signatures mentioned in the 'expert' report are certainly incapable of independent verification. These sample or specimen signatures have not been 'admitted or proved to the satisfaction of the court' within meaning of s 73 of the Evidence Act 1950.

[60] The 'expert' report suggests that the sample or specimen signatures relied upon by the 'expert' were provided by the first defendant's solicitors and this would squarely fall into the category of 'self-serving exemplars'.

[61] Given all these shortcomings, the High Court was not in a position to hold that the sample or specimen signatures relied upon by the 'expert' were in fact that of the first defendant nor was the High Court in a position to satisfy itself, as required by law, and based on observation that it was 'safe'to accept the opinion of the 'expert' (*Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai*). The High Court had correctly disregarded the 'expert' report.

[62] The allegation that the first defendant's signature on the agreement was forged was not considered by the High Court. It must be borne in mind that the allegation of forgery was not pleaded in the first defendant's defence. This allegation was merely 'put' to the plaintiff's witness (see pp 43 and 97 of the appeal record). A perusal of the first defendant's defence especially at para 4 would show that the first defendant admitted opening the subject account but disputed utilising or authorising trades on the said account. Be that as it may, even if the first defendant's allegation of forgery were to be accepted, the first defendant still bears the burden of proving the same (see *EON Bank Bhd v Hotel Flamingo and another case* [2005] 1 MLJ 712 at p 722, the decision of my learned brother Low Hop Bing J (now JCA)). As demonstrated, the only evidence tendered by the first defendant to prove the alleged forgery by way of an 'expert' report was inadmissible.

[63] The first defendant's counterclaim for the sum of RM2m was rightly rejected by the High Court. Since the first defendant led no positive evidence in support of his counterclaim, he cannot deny his earlier sworn statement made during interrogatories that he has no knowledge of the sum of RM2m (see pp 26 and 27 of the appeal record).

[64] Finally, I will now say something about the finding of facts by the High Court which has been alluded to by my learned brother Low Hop Bing JCA. An appellate court will not readily interfere with the finding of facts arrived at by the trial court. It is trite law that the primary task of evaluation of the evidence and the function of determining where the truth lies, on a balance of

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probabilities, is entrusted by law to the trial court. In this appeal to the High Court. And the appellant court is under a duty to intervene with the finding of facts by the trial court where the trial court has so fundamentally misdirected itself that a reasonable man may safely say that no reasonable court which had properly directed itself and asked the right questions would have arrived at the same conclusion (*Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh* [1997] 2 MLJ 373, (CA) at p 379; [1997] 3 AMR 2430 at p 2440 D–E; *Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153, (CA) at pp 171H–173A; [1995] 2 AMR 1353; *Associated Tractors Sdn Bhd v Woo Sai Wa* [1997] 5 MLJ 441 at pp 450 F–H; and *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131 at para 18; [2006] 3 AMR 410 at p 417; [2006] 2 CLJ 337, (CA)).

[65] The case of *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567; [2003] 2 AMR 6; [2003] 1 CLJ 585, (CA), sets out certain categories in which appellate interference may be warranted. It would be ideal to set out, briefly, instances where the finding of facts by the trial court was reversed by the appellate court:

(a) non-consideration or insufficient or no judicial appreciation of material evidence constitutes 'insufficient judicial appreciation of relevant evidence' (*Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1, (FC))

(b) where the audio visual advantage reserved to a trial judge had been missed or that the findings made by the trial judge do not accord well with the probabilities of the case (*Len Min Kong v United Malayan Banking Corp Bhd and another appeal* [1998] 2 MLJ 478 at pp 486 C–D; [1998] 3 AMR 2641 at p 2655; [1998] 2 CLJ 879, (CA); *Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd and other appeals* [2004] 4 MLJ 105; [2004] 6 AMR 319; [2004] 4 CLJ 282, (CA); and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 6 AMR 781; [2004] 4 CLJ 309, (FC));

(c) where the facts were misapprehended and the wrong principles of law were blindly applied by the trial judge (*Lim Chor Ching & Anor v Idris Abdul Karim (and Anor Appeal)* [1998] 3 AMR 3182; [1998] 3 CLJ Supp 145 at pp 156 a–g);

(d) where there was a failure to assess the evidence with the documents at hand and view it against the probabilities of the case (*Loo Hon Kong v Loo Kim Lim @ Loo Kim Leong* [2004] 4 AMR 591; [2004] 4 CLJ 1, (CA));

(e) where there was a failure to consider the relevancy of contemporaneous documents (*Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35, SC at p 37); and

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(f) where the finding of facts was contrary to the documentary evidence (*Associated Tractors Sdn Bhd v Woo Sai Wa* at p 451 C).

[66] In the present appeal, I see no reason to intervene or interfere with the finding of facts arrived at by the High Court.

[67] I am in total agreement with the views expressed by my learned brother Low Hop Bing JCA. For all these reasons, I now make those orders that were made by His Lordship.

[68] I too have shown this supporting judgment in draft to my learned brother Low Hop Bing JCA and His Lordship has kindly agreed with it.

Appeal dismissed with costs.

Reported by Ashok Kumar